In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-967.

PETER DiPIRO,
PETITIONER,

v.

JAMES L. TAFT, MAYOR, CITY OF CRANSTON; EARL CROFT, DIRECTOR OF PERSONNEL, CITY OF CRANSTON; THOMAS POWERS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Memorandum in Opposition to Petition for Writ of Certiorari.

JOSEPH A. KELLY,
CARROLL, KELLY & MURPHY,
326 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 331-7272

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

Constitutional and Statutory Provisions.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-967.

PETER DiPIRO,
PETITIONER,
v.
JAMES L. TAFT, MAYOR, CITY OF CRANSTON;
EARL CROFT, DIRECTOR OF PERSONNEL,
CITY OF CRANSTON; THOMAS POWERS,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Memorandum in Opposition to Petition for Writ of Certiorari.

The respondents respectfully urge the Court to deny the petition for writ of certiorari as prayed for by petitioner.

Opinion Below.

The opinion of the Court of Appeals for the First Circuit, reported at 584 F. 2d 1, appears in petitioner's Appendix (App. A).

Jurisdiction.

The Court of Appeals for the First Circuit entered its judgment on September 22, 1978. The petition for certiorari was filed within 90 days of that date.

Statutory Provision Involved.

UNITED STATES CODE, TITLE 42.

SECTION 1983. *Civil Action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Question Presented.

Should a writ of certiorari issue where the petitioner has failed to present a factual or legal basis sufficient to support a claim under 42 U.S.C. § 1983?

Statement of the Case.

In the original complaint filed in the United States District Court for the District of Rhode Island, the petitioner bot-

tomed a claim of deprivation of rights on 42 U.S.C. § 1983. The petitioner claimed he was wrongfully deprived of the position of Fire Chief of Cranston, Rhode Island. The case was tried before Mr. Justice Francis J. Boyle, sitting with a jury. Petitioner's cause was legally and factually unsound and resulted in a defendants' verdict. The First Circuit affirmed.

By way of background, the City of Cranston, Rhode Island, is governed by a Charter approved by referendum on November 6, 1962. This Charter provides for a strong local government, strong power in the executive branch and a classified employment system (Plaintiff's Exhibit 13).

The Charter provides that a vacancy in the position of Fire Chief shall be filled by executive appointment after competitive examination given by the Personnel Director in accordance with departmental rules and regulations. The Charter requires the Personnel Director to hold competitive examinations, grade the candidates and certify the three highest candidates to the Mayor. It directs the Mayor to appoint the Fire Chief from among the persons so certified.

On February 21, 1975, the then Fire Chief of the Cranston Fire Department resigned, thereby creating a vacancy in the position. The petitioner, Peter DiPiro, and one William Maine, among others, were candidates for the vacancy.

In accordance with the mandate of the Charter, the Director of Personnel, respondent Earl Croft, set up oral and written tests to rate the candidates for the position. He advertised the opening and administered the written and oral examinations.

The two candidates in question, *viz.* William Maine and Peter DiPiro, finished with a tie score in the written examination. The regulations also called for an oral examination which was then given. This oral examination was administered by a tribunal consisting of three fire chiefs. The panel consisted of Michael Moise, Chief of the Providence Fire De-

partment; Norman Segee, Chief of the Smithfield Fire Department; and Francis Gallant, Chief of the Pawtucket Fire Department.

After the oral examination each candidate was graded separately by the members of the panel. Chief Michael Moise graded William Maine one point higher than Peter DiPiro. Chief Francis Gallant graded William Maine nineteen points higher than Peter DiPiro. Chief Norman Segee graded Peter DiPiro twenty points higher than William Maine.

Chief Norman Segee then realized that he had mismarked Peter DiPiro by giving him twenty points more than he earned in the examination. He appeared at the Cranston City Hall in order to rectify that grade but was not permitted to change the grade. He then wrote a letter (Defendants' Exhibit A) notifying the Personnel Director of the mismarking and stating that he had mismarked Peter DiPiro by giving him an extra twenty points.

It was quite evident, per the evidence as adduced at trial, that Mr. Maine actually scored higher in the overall examination than did Mr. DiPiro and did in fact finish first.

The Personnel Director certified both names to the Mayor and indicated that both candidates had finished "Tie for first." The Director would not change the mark, obviously an unearned benefit to the petitioner.

The respondent Mayor James Taft then conferred with the respondent Thomas Powers who recommended William Maine over Peter DiPiro. The Mayor then appointed William Maine as Chief of the Cranston Fire Department and made this appointment strictly upon merit based upon personal knowledge and his judgment that Mr. Maine was the best man for the position.

The respondents introduced a wealth of evidence in support of this contention in the District Court. The evidence was clear that the appointment was based upon merit and was not

political. The evidence clearly showed that William Maine was a fire fighter of proven ability and with administrative capabilities (Tr. 327-328). Conversely, there was ample evidence that Mr. DiPiro had neither the proper leadership qualities nor the administrative ability to run the Cranston Fire Department (Tr. 378). The Mayor testified affirmatively that he in no way discriminated against Mr. DiPiro and cited specific instances of conduct by Mr. DiPiro which showed his inability to administer or to run the department.

Petitioner makes reference to certain evidence introduced in the District Court as it concerns money contributions and the violation of merit system rules and regulations. This calls for comment by the respondents. At the trial in the District Court the evidence offered by the petitioner was, to say the least, in large part rank hearsay. The District Court judge so ruled and his ruling was affirmed by the First Circuit. Further, the reference to a violation of the merit system rules and regulations is inaccurate. The Charter of the City of Cranston does have a "prohibited practices provision," but that provision is to protect the political views of city employees, as well it should. The Charter prohibits discrimination against a person in the classified service because of his political opinions. In addition, although the Charter does direct itself to political contributions, it does not provide (as petitioner alleges) that the Mayor has any duty to remove the party so doing. The Charter provides that there can be a penalty for a "wilful violation" and no evidence of a wilful violation was presented in the District Court. Further, the "prohibited practices section" permits political contributions when allowed by Federal law and the City Solicitor of the City of Cranston interpreted Section 14.09 of the Charter as permitting political contributions. When the petitioner makes reference to proof introduced in the District Court, respondents must point out that much of

the so-called proof was rejected as hearsay and rebutted by overwhelming evidence to the contrary.

Reference in the petition to a request for a political contribution by Mr. William Maine to Mr. DiPiro falls into the same category. This was bottomed on hearsay presented at the District Court level and rejected in the Circuit Court. In effect, there was no real evidence to support any allegation of discrimination against Mr. DiPiro. The evidence in the District Court clearly indicated that the Charter permitted the Mayor's discretion in making an appointment from the certified, qualified candidates. The evidence to the effect that he picked the most qualified person for the position was overwhelming. This is evidenced by the comment contained in the opinion handed down by the First Circuit: "We have serious doubts as to whether this case warranted submission to a jury. The federal courts are not super personnel boards ordained to reevaluate appointments and dismissals made in the course of state and local government operations. Labelling a firing or hiring unconstitutional does not make it so. There was nothing unfair or even improper about the mayor of Cranston's appointment of its fire chief." (Pet. App. 5a-6a.)

Reasons for Denying the Writ.

THE APPOINTING AUTHORITY HAD THE RIGHT AND THE DISCRETION TO APPOINT THE CHIEF OF THE CRANSTON FIRE DEPARTMENT PURSUANT TO THE CRANSTON CITY CHARTER. IN DOING SO HE IN NO WAY VIOLATED ANY RIGHTS OF THE PETITIONER.

The Fire Chief of the City of Cranston is a member of the classified service (Plaintiff's Exhibit 12, § 9.04); promotion to

Fire Chief is governed by the Charter; it provides that the appointing authority, *viz.* the Mayor of the City of Cranston, shall make the appointment from the three highest rated candidates.

> Vacancies in higher positions in the classified service shall be filled as far as practicable by promotion from a lower class of positions upon the basis of competitive examinations including a consideration of service ratings, provided that in case the director of personnel with the approval of the mayor directs any such position may be filled on the basis of competitive examination open not only to members of the classified service but to persons not in the service of the city. All examinations for the purpose of filling higher positions in the classified service shall be conducted by the director of personnel in accordance with the rules and regulations of the department and he shall certify to the appointing authority the three candidates rated highest if there be that many passing the examination and if not all of the candidates passing the examination in the order of their rank in the examination and the appointments shall be made from among the persons so certified. (Plaintiff's Exhibit 12, § 14.08.)

It might be stated that the Civil Service Rules and Regulations (Plaintiff's Exhibit 4) bear upon the appointment, but the rules and regulations per the Charter "shall not be inconsistent with the provisions of the Charter" and all appointments made under the Civil Service rules shall "*as far as practicable*" be by competitive examination. It is clear, therefore, that the Charter controls and the regulations contemplate the discretion reserved to the Mayor.

The language of the Charter gives the Mayor discretion to appoint. He has a choice. He can choose anyone from the three highest rated candidates.

The facts of this case clearly show a merit appointment. In fact, the petitioner, if anyone, was given preference. He entered into competition with Mr. William Maine and after the examination was given a mark equal to the mark given Mr. Maine. Yet, clearly, he scored some twenty points lower. If one is talking about a preference in the examination, one must certainly say that the petitioner was given that preference.

Assuming, arguendo, that the appointment by the Mayor was a political appointment; then, it is submitted, it is a valid appointment with a basis in law.

The case of *Elrod* v. *Burns*, 427 U.S. 347 (1976), concerned the termination of Republican sheriffs who were employed at the Cook County sheriff's office. The Court addressed itself to the practice of patronage dismissals and indicated that such dismissals might clearly infringe First Amendment interests. The Court did state that the prohibition on encroachment of First Amendment protection was not an absolute one. The Court stated that a person had no "right" to a valuable government benefit — *it might be denied for a number of reasons. Id.* at 360. The Court struck the balance interest by noting that one could not be discharged from a nonsupervisory position for purely partisan reasons. *Id.* at 362, 372. *The Court did state that one could be discharged when the position was a policy making position.* The Court said (at 367):

> The justification [need for political loyalty of employees] is not without force, but is nevertheless inadequate to validate patronage wholesale. *Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. . . .* (Emphasis added.)

And again the Court stated (at 372-373):

> In summary, patronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end. There is also a need to insure that policies which the electorate has sanctioned are effectively implemented. That interest can be fully satisfied by limiting patronage dismissals to policymaking positions. Finally, patronage dismissals cannot be justified by their contribution to the proper functioning of our democratic process through their assistance to partisan politics since political parties are nurtured by other, less intrusive and equally effective methods.

In *Elrod* the Court established a criterion for dismissal. The instant case is not one of dismissal. It is an allegation of "failure to promote." To apply the *Elrod* law to this situation would be to view the matter in the light most favorable to the petitioner. There is no question that the Fire Chief of the City of Cranston is in a policymaking position.

The Charter defines the duties of the Fire Chief (Plaintiff's Exhibit 13, § 9.05):

> Subject to the supervision and control of the Mayor the *fire chief shall be in direct command of the fire department* and of the training of any *cooperating volunteer companies and their activities* when engaged *in fighting a fire. . . .* (Emphasis added.)

Further, the rules and regulations of the Fire Department provide (Defendant's Exhibit B):

1. The Chief of the Department shall have command and management of the Department and shall have *power to direct and assign all subordinates and companies*. . . . (Emphasis added.)

It is abundantly clear that the position of Fire Chief for the City of Cranston is a policymaking position.

The petitioner's claim in this case is inconsistent, to say the least. First, he states that the appointment should be on merit alone. Yet, when it appears that Mr. Maine qualified on merit alone, the petitioner argues that Mr. Maine should be penalized because of politics. The petitioner attempts to say that the *Elrod* decision does not apply, yet gives no credence or weight to the Charter which gives discretion to the appointing authority. This is a discretion that is given by the people of the City of Cranston and, it is submitted, strictly for the reasons set forth by the Court in *Elrod* wherein the Court said that "the government may deny [petitioner] the benefit for any number of reasons." 427 U.S. at 360-361.

This case does not present a unique question nor will it decide the rights of other litigants. This case concerns a discretionary appointment to the position of Fire Chief. It is a case that really turns on its own facts. As can be readily seen, there were many fact issues presented to the jury at the trial level and ample evidence to support the jury's verdict. The decision of the lower court was correct notwithstanding the questions sought to be raised by the petition.

The Circuit Court, in its decision, noted that the trial court correctly applied the *Elrod* decision's holding that "[l]imiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end." *Id.* at 367 (Pet. App. 3a). In addition, the court noted that the City Charter authorized a selection from among the three top candidates and that the

selection came from the three top candidates. The Circuit Court also directed itself to the evidence and noted that "DiPiro lacked the managerial skills necessary for effective management of the fire department"; that he tended to be a "good guy"; that he was not a good leader; not qualified to administer a large department with a million-dollar budget; and had gone counter to the policies of the Mayor when he testified in behalf of retaining in the department a fireman who had been convicted of a narcotics offense (Pet. App. 3a-4a).

The Circuit Court succinctly noted that there was "no evidence which would warrant the finding of a purposeful and intentional discrimination against [the petitioner]" (Pet. App. 4a-5a).

As was noted by the Circuit Court, the facts of the instant case differ from *Elrod* in that the petitioner was afforded an opportunity to compete for the position of Fire Chief; he was afforded all his rights under the Charter; and "[t]he jury surely was entitled to find, on the basis of the evidence, that the decision to appoint Maine rather than DiPiro trampled no legally protected right of DiPiro and specifically did not abridge his guarantee to equal protection of the laws" (Pet. App. 5a).

Conclusion.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOSEPH A. KELLY,
CARROLL, KELLY & MURPHY,
326 Industrial Bank Building,
Providence, Rhode Island 02903.
(401) 331-7272